No. 88-1162

Supreme Court, U.S.
FILED
DEC 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1988

MELVIN C. MOORE,

Petitioner,

v.

CITY OF RICHMOND
and
COMMONWEALTH OF VIRGINIA,

Respondents.

ON APPEAL FROM THE VIRGINIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

John B. Mann, Esquire
LEVIT & MANN
419 North Boulevard
Richmond, Virginia 23220
(804) 355-7766

Counsel for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

A.

Questions Presented for Review

1. Were Melvin Moore's constitutional rights to due process as a public employee violated when he was terminated from his position as head of the City of Richmond Juvenile Detention Center?

2. Was Melvin Moore's lawsuit barred by the doctrine of res judicata?

B.

Parties To The Proceedings

1. The Petitioner is Melvin Moore.

2. The Respondents are the City of Richmond and the Commonwealth of Virginia.

The City of Richmond is represented by William Joe Hoppe, Esquire, Senior Assistant City Attorney, 300 City Hall, 900 East Broad Street, Richmond, Virginia 23219. The Commonwealth of Virginia is represented by Peter R. Messitt, Esquire, Assistant Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.

C.

Table of Contents

Questions Presented for Review 1

Parties to the Proceedings 1

Statement of Jurisdiction 4

Constitutional Provisions Involved 4

Statement of the Case 5

Statement of Proceedings 6

Statement of Facts 7

Argument:

I.

Moore's Due Process Rights As A Public Employee Were Violated When He Was Not Afforded Any Avenue To Contest His Termination. 11

II.

Moore's Claim Is Not Barred By Res Judicata. 14

Appendix 19

D.

Table of Authorities

Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976) 11

Board of Regents v. Roth, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 538 (1972) 11

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) 12,13

Hughes v. U.S., 71 U.S. 232, 18 L.Ed. 303 (1866) 15

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 12

Mowry v. City of Virginia Beach, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956) 16

Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956) 17

Wright v. Castles, 232 Va. 218, 349 S.E.2d 125 (1986) 17

Fourteenth Amendment to the Constitution of the United States 4,11,14

28 U.S.C. § 2104 4

Virginia Code Section 2.1-114.5:1 8

E.

This Petition for Writ of Certiorari is sought to request review of the final order of the Supreme Court

of Virginia dated June 1, 1988. A Petition for Rehearing was denied on September 23, 1988.

F.

Statement of Jurisdiction

(i) The date of the judgment of the Supreme Court of Virginia denying the appeal to be reviewed is June 1, 1988.

(ii) The denial of the request for rehearing was dated September 23, 1988.

(iii) The statutory provision which confers jurisdiction on the United States Supreme Court to review the judgment in this case by writ of certiorari is 28 U.S.C. § 2104.

G.

Constitutional Provisions Involved

(i) The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

H.

Statement Of The Case

This case concerns a claim by Melvin Moore, a long time head of the City of Richmond Juvenile Detention Home for compensatory and punitive damages for the wrongful termination of his employment on May 13, 1983.

This suit was filed in the Circuit Court of the City of Richmond, Virginia. In response to the lawsuit the defendants filed various pleas, including a plea of res judicata. This plea was based on the earlier dismissal of a Bill of Complaint filed by Moore on July 7, 1983 in the Circuit Court of the City of Richmond,

Virginia, Case No. G-9396-2, in which Moore requested the issuance of an injunction restoring him to his former employment position. Moore also filed an action in the United States District Court for the Eastern District of Virginia, Richmond Division, Civil Action No. 85-0435-R, for injunctive relief. This case was dismissed as being barred by the dismissal of the state action for injunctive relief.

I.

Statement Of The Proceedings

On June 2, 1987, the parties held a hearing before the Honorable Robert L. Harris, Judge of the Circuit Court of the City of Richmond, Virginia. The Court later entered an order on July 13, 1987 dismissing the case holding that the action was barred by the doctrine of res judicata.

Moore appealed the dismissal order to the Virginia Supreme Court. On June 1, 1988, the Virginia Supreme Court dismissed the appeal finding no reversible error.

Moore duly filed a Petition for Rehearing in the Virginia Supreme Court. This Petition for Rehearing was denied on September 23, 1988.

The constitutional claims were first raised in the Motion for Judgment, a copy of which is attached hereto as part of the appendix. The Circuit Court of the City of Richmond did not reach these issues because the plea of res judicata was sustained. The denial of constitutional due process is the basis for Moore's lawsuit asking for an award of compensatory and punitive damages.

J.

Statement of Facts

Melvin Moore was employed as Director of the Juvenile Detention Home for the City of Richmond, Virginia since 1957 for approximately 25 years. He was paid by state and local funds. On April 29, 1983, Moore was advised by the Judges of the Juvenile and Domestic Relations District Court for the City of Richmond that he was suspended from his job for two

weeks. After the two weeks' suspension, his employment was terminated on May 13, 1983. Moore was given no opportunity to contest his termination before an impartial panel or authority. He was only told that he could have a hearing before an appointed judge. A grievance was not provided in the Juvenile Detention Home Personnel Policies. However, he was not considered a City or State employee to pursue his rights under the City of Richmond or State of Virginia grievance procedures.

Prior to his termination, the Juvenile Court judges enacted a personnel policy which adopted the certain provisions of personnel policy for the City of Richmond employees except for the following areas: recruitment, evaluation, vacation, compensatory time, sick leave, holidays, and grievance procedure.

A grievable matter is defined in Virginia Code Section 2.1-114.5:1 as follows:

> A. Definition of grievance - A grievance shall be a complaint or dispute by an employee relating

> to his or her employment, including but not necessarily limited to (i) disciplinary actions, including dismissals, demotions and suspensions, provided that dismissals shall be grievable whenever resulting from formal discipline or unsatisfactory job performance; (ii) the application or interpretation of personnel policies, procedures, rules and regulations, including the application of policies involving matters referred to in subsection B (iii) below; (iii) acts of reprisal as the result of utilization of the grievance procedure or of participation in the grievance of another state employee; and (iv) complaints of discrimination on the basis of race, color, creed, political affiliation, age, handicap, national origin or sex.

However, rather than adopting the grievance procedure adopted in the City of Richmond Personnel Manual or provided by state law for state employees, the Juvenile Detention Home policies provided a grievance procedure "through the chain of command." The final authority for the resolution of the grievance rested with the Chief Judge of the Juvenile and Domestic Relations District Court. No right to a pre-termination or post-termination hearing before an

impartial body was provided in the Juvenile Detention Home personnel policy.

After the suspension began, Moore appeared before the three judges of the Richmond Juvenile Court. After the conclusion of this hearing, Moore was terminated on May 13, 1983. When Moore was terminated by the action of the Chief Judge, Moore requested that he be advised of the proper procedure to contest his termination. The Judges did not advise him that he could avail himself of either the grievance procedure by either the State of Virginia or the City of Richmond. Moore was advised that the Judge's decision was final. He was not provided a hearing before the judges responsible for his termination or by any other judicial or administrative body.

K.

Argument

L.

Moore's Due Process Rights As A Public Employee Were Violated When He Was Not Afforded Any Avenue To Contest His Termination.

It is axiomatic that a public employee has a property interest in his continued employment which is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In Board of Regents v. Roth, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 538 (1972), this Court established the rule that when a public employee has a legitimate claim of entitlement to continued public employment, he possesses a property interest that is protected by the Due Process Clause of the Fourteenth Amendment. This right may be created by statute, written contract or by rules and mutually explicit understandings between the employer and employee. See Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976).

In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), this Court established a balancing test for considering whether a governmental deprivation of a protected property or liberty interest violated due process. In determining whether a violation exists, this Court required the following to be weighed:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

This principle of due process was later explained by this Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985): "The question then remains what process is due." 470 U.S. at page 541, 105 S.Ct. at 1493. Loudermill requires at the least that the termination be preceded "by notice and opportunity for hearing

appropriate to the nature of the case." 470 U.S. 542, 105 S.Ct. 1493. As this Court observed:

> We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest". 470 U.S. at 542, 105 S.Ct. at 1493.

Loudermill further required that the hearing procedure be provided by the written administrative procedure:

> We conclude that the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures as provided by the ... statute. 470 U.S. at 547-548, 105 S.Ct. 1496.

In reviewing the situation facing Moore, it is clearly evident that his 25-year employment at the Juvenile Detention Home provided him with a substantial interest in his continued employment. However, there existed no grievance procedure for Moore to challenge his termination. The Judges were the force behind his termination, yet there did not exist any remedy to contest his termination. Under the Juvenile Detention Home Personnel policies, there was no means for him

to avail himself of either the grievance procedure provided by the City of Richmond or by the State of Virginia since Moore was not classified as either a City or State employee.

Therefore, it is evident that the personnel policies did not provide Moore with even minimal due process as guaranteed by the Fourteenth Amendment. Moore had no opportunity to contest his termination through the grievance procedure provided to all city and state employees by statute. Without the opportunity to be heard, Moore's constitutional rights have clearly been violated.

II.

Moore's Claim Is Not Barred By Res Judicata.

The defendants claim that this appeal is barred by the doctrine of res judicata. However, the earlier dismissal of the Federal action did not reach any determination of the merits of Moore's claims. His Federal action was dismissed on the grounds that his

prior suit for injunctive relief barred a subsequent action for injunctive relief. This certainly cannot be considered to be res judicata to a later lawsuit for damages. See Hughes v. U.S., 71 U.S. 232, 18 L.Ed. 303 (1866). Likewise, the dismissal in state court is not res judicata because it failed to determine what if any grievance procedure was provided to Moore by the Juvenile Court judges and how he failed to follow any grievance procedures if in fact none existed. These courts have each failed to determine whether the Juvenile Court judges had any statutory authority to exercise administrative control over the detention home and if so did they have the legal obligation to provide the detention home personnel a meaningful grievance procedure to contest terminations or other grievable adverse actions.

The prior actions were brought prior to Moore's termination in an effort to prevent his termination. The second action can correctly be considered as an action for damages based upon his wrongful termination. Therefore, the causes of action in the first and second

suits are not identical and the first action is not a bar to the second action. The Commonwealth of Virginia was not a party to the first action but was properly named a party in the subsequent suit. Therefore, the parties are different and this suit should be permitted to proceed.

Virginia has traditionally adopted the distinction between action for damages and actions for injunctive relief.

The Virginia Supreme Court in the case of Wright v. Castles, 232 Va. 218, 349 S.E.2d 125 (1986), held that an action for injunctive relief is not res judicata to a subsequent law action unless the very matter in controversy in the pending action was decided in the prior suit. The decision sets forth the requirements to bar a subsequent action on the basis of res judicata.

> For res judicata purposes, four elements must concur: (1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made. Mowry v. City of Virginia Beach, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956).

It is clear from a comparison of the two complaints that several of these required elements are lacking:

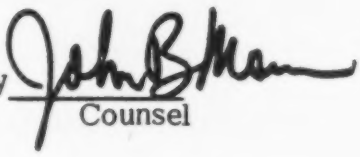
(1) The remedies sought are not identical, and

(2) The parties to the action are not identical.

In Wright, the Virginia Supreme Court cites its decision in Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956) which concerned an employment contract between the plaintiff and the defendants. In Worrie, the Virginia Supreme Court held that while both causes of action concerned the same employment contract, the purposes of the two suits were not identical. Likewise, in this case the chancery suit was brought to enjoin the termination of Moore without cause and without a hearing. The lawsuit for compensatory damages was brought to compensate Moore for his wrongful termination and the violation of his constitutional rights.

Therefore, this lawsuit should not be barred by the doctrine of res judicata and be remanded for trial on the merits.

MELVIN C. MOORE

By 
Counsel

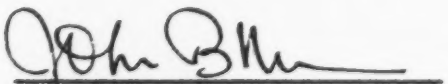
John B. Mann, Esquire
LEVIT & MANN
419 North Boulevard
Richmond, Virginia 23220
(804) 355-7766

FILING AND MAILING CERTIFICATE

I, John B. Mann, hereby certify that on this 21st day of December, 1988, I filed with the Clerk's Office of the United States the foregoing Petition for a Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

William Joe Hoppe
Senior Assistant City Attorney
300 City Hall
900 East Broad Street
Richmond, Virginia 23219

Peter R. Messitt, Esquire
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219



John B. Mann
LEVIT & MANN
419 North Boulevard
Richmond, Virginia 23221